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No.

IN THE

Supreme Court of the United States

GAMBLERS SUPPLY MANAGEMENT CO. AND SODAK GAMING IOWA INC., A/K/A SODAK GAMING, INC.,

Petitioners

v.

BYRON P. CLEMENTS AND MARK W. CLEMENTS,

Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Iowa Supreme Court improperly interfered with the uniformity of substantive federal maritime law by recognizing a cause of action for wrongful termination of a maritime employee who is fired for refusing to violate a safety statute in direct contradiction to both the Fourth and the Fifth United States Circuit Courts of Appeals which held:

1. That this exact cause of action does not exist in maritime law. Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826 (1991); Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990), cert. den., 499 U.S. 907, 111 S. Ct. 1108, 113 L.Ed.2d 218 (1991); Feemster v. BJ-Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989), and

2. That state law on this issue is expressly preempted. Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826 (1991)

CORPORATE DISCLOSURE (RULE 29.6)

Sodak Gaming, Inc. is a wholly owned subsidiary of International Game Technology, which is a publicly traded company on the New York Stock Exchange.

Gamblers Supply Management Company has been merged into Isle of Capri Marquette, Inc., which is a wholly owned subsidiary of Isle of Capri Casinos, Inc. Isle of Capri Casinos, Inc. is a publicly traded company on the NASDAQ.

There are no other publicly traded corporations which own more than a ten percent share in either Sodak Gaming, Inc. or Gamblers Supply Management Company.

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of Appeals which held that this exact cause of action does not exist in maritime law and that state law on this issue is expressly preempted. Meaige v. Hartley Marine, 925 F.2d 700 (4th Cir. 1991); Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990); Feemster v. BJ-Titan, 873 F.2d 91 (5th Cir. 1989) . . . . . -9-

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Clements v. Gamblers Supply Co., et al, Case No. 48/98-1817, (Decision of the Iowa Supreme Court reversing the District Court, filed April 26, 2000; Petition for Rehearing denied May 15, 2000).

JURISDICTIONAL STATEMENT

Petitioners seek Certiorari from an Iowa Supreme Court decision filed on April 26, 2000. Petitioners timely filed a Petition for Rehearing on May 9, 2000. That Petition was denied by Order of the Iowa Supreme Court on May 15, 2000. This Petition for Writ of Certiorari is being filed within 90 days of that denial pursuant to United States Supreme Court Rule 13(1) and (3).

This United States Supreme Court has jurisdiction pursuant to U.S. Sup. Ct. Rule 10(b) because the Iowa Supreme Court, the Iowa court of last resort, has decided an important federal question that conflicts with the decisions of two Federal Courts of Appeals that have primary jurisdiction over

maritime matters, namely, Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826 (1991); Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990), cert. den., 499 U.S. 907, 111 S. Ct. 1108, 113 L.Ed.2d 218 (1991); Feemster v. BJ-Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989).

CONSTITUTIONAL AND OTHER PROVISIONS

28 U.S.C. § 1333 Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 2114 Protection of seamen against discrimination

> (a) An owner, charterer, manager operator, agent, master, or individual in charge of a

vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.

(b) A seaman discharged or otherwise discriminated against in violation of this section may bring an action in an appropriate district court of the United States. In that action, the court may order any appropriate relief, including —

(1) restraining violations of this section; and

(2) reinstatement to the seaman's former positions with back pay.

46 C.F.R. Subpart 15.515

Compliance with Certificate of Inspection (Reproduced in Appendix)

46 C.F.R. Subpart 91.45

Repairs and Alterations (Reproduced in Appendix)

46 C.F.R. Subpart 110.25

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46 U.S.C. § 3313

Compliance with Certificate of Inspection (Reproduced in Appendix)

STATEMENT OF THE CASE

Petitioners Sodak Gaming, Inc. and Gamblers Supply Management Company were the owners and operators of the Miss Marquette Riverboat Casino. Gamblers Supply Management Company was a wholly-owned subsidiary of Sodak Gaming, Inc.

Byron Clements was employed as a licensed Captain and Director of Marine Operations of the Miss Marquette from June 29, 1994, until he was terminated on October 2, 1995. As Director of Marine Operations, Byron Clements was responsible for assuring compliance with state, federal, and Coast Guard operational safety laws and regulations.

Mark Clements, son of Byron Clements, was employed as a licensed Captain and Manager of Marine Operations of the Miss Marquette from August 10, 1994, until his termination on June 28, 1996. Mark Clements was responsible for assuring compliance with certain operational safety laws and regulations aboard the Miss Marquette.

Byron and Mark Clements brought this cause of action for wrongful termination alleging that they were discharged for refusing to violate state, federal, and Coast Guard law. Specifically, they assert that they were discharged for refusing to violate: 46 U.S.C. § 3313, 46 U.S.C. § 8104(d), 46 C.F.R.

Subpart 91.45, 46 C.F.R. Subpart 110.25, and 46 C.F.R. Subpart 15.515.[1] These statutes and regulations all deal with federal maritime safety issues and are set forth in the Appendix to this Petition.

On July 31, 1998, Petitioners filed a motion for summary judgment in the Clayton County, Iowa District Court. The motion alleged that, although the state court had concurrent jurisdiction under the "savings to suitors" clause of 28 U.S.C. § 1333(1),[2] the state court was bound to apply the substantive maritime law which governed wrongful termination issues. The motion also alleged that because the Fourth and Fifth Circuit Courts of Appeals had addressed the exact issue in this case, and held that no cause of action existed for wrongful termination when a maritime employee is fired for refusing to violate a safety statute, summary judgment should be

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[1] It must be noted that while Petitioners heavily dispute these allegations, it must be assumed for the purposes of this appeal that Respondents' allegations are true.

[2] The "savings to suitors" clause, which has its roots in the Judiciary Act of 1875, provides primary jurisdiction over maritime cases to federal courts and provides concurrent jurisdiction to state courts as long as the state courts apply federal maritime law.

granted.

On September 22, 1998, the Clayton County District Court granted Petitioners' motion for summary judgment, acknowledging that federal maritime law was the controlling law. The Iowa District Court further held that federal maritime law did not recognize the Clements' cause of action, citing Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826 (1991); Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990), cert. den., 499 U.S. 907, 111 S. Ct. 1108, 113 L.Ed.2d 218 (1991); and Feemster v. BJ-Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989).[3]

The Clements appealed this decision to the Iowa Supreme Court. On April 26, 2000, the Iowa Supreme Court reversed the district court.[4] In doing so, the Iowa Supreme Court held that even though maritime law applied, Iowa courts were not precluded from applying state law on wrongful termination and could ignore existing federal maritime law on the issue. In so holding, the Iowa Supreme Court held

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[3] The Iowa District Court's Order is reproduced in the Appendix to this Petition.

[4] The Iowa Supreme Court's Opinion is reproduced in the Appendix to this Petition.

that Feemster and Garrie were inapplicable, and held that Meaige was wrongly decided.

In essence, the Iowa Supreme Court refused to recognize the binding nature of three decisions from Federal Courts of Appeals directly on point, choosing instead to apply Iowa law that recognized the Clements' cause of action. As a result, the Iowa Supreme Court created a situation where maritime law is uniformly applied in almost every states to deny a cause of action like the one raised by the Clements. However, because the Clements were fired in Iowa, they are provided a cause of action by the Iowa courts.

Based on the Iowa Supreme Court's failure to recognize the binding nature of substantive federal maritime law, and the overreaching of its concurrent jurisdiction created in the "savings to suitors" clause, Petitioners now file this Petition for Writ of Certiorari. In doing so, Petitioners ask this U.S. Supreme Court to apply the existing federal law properly and restore uniformity to the substantive maritime law on wrongful termination. Where federal maritime courts have decided a substantive issue, state courts cannot create conflicting decisions.

REASONS FOR GRANTING WRIT

I. The Iowa Supreme Court improperly interfered with the uniformity of substantive federal maritime law by recognizing a cause of action for wrongful termination of two maritime employees who were fired for refusing to violate a safety statute in direct contradiction to both the Fourth and the Fifth Circuit United States Courts of Appeals which held that this exact cause of action does not exist in maritime law and that state law on this issue is expressly preempted. Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826 (1991); Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990), cert. den., 499 U.S. 907, 111 S. Ct. 1108, 113 L.Ed.2d 218 (1991); Feemster v. BJ-Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989).

A. It is a fundamental principle of maritime law that states cannot contradict federal substantive maritime law by applying conflicting state law.

While the federal courts have been given the exclusive jurisdiction to hear maritime cases, state courts have been given concurrent jurisdiction to hear in personam maritime cases under the "savings to

suitors" clause. 28 U.S.C. § 1333. According to this concurrent jurisdiction, however, states are bound to apply substantive federal maritime law when sitting in maritime jurisdiction. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S. Ct. 2485, 91 L.Ed.2d 174 (1986).

In the present case, the Iowa Supreme Court erred when it acknowledged that maritime law governed this case, but then rendered its decision based on the Iowa state law of wrongful termination. In doing so, the Iowa Supreme Court ignored the consistent holdings of this United States Supreme Court over the last 120 years which have held that states cannot contradict substantive maritime law:

> "It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. **The source of the governing law applied is in the national, not the state, governments. If by practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny,**

> **federal rights**.... So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so, raises a federal question reviewable here under 237(b) of the Judicial Code, 28 U.S.C. 344(b), 28 U.S.C.A. 344(b).14."

Garrett v. Moore-McCormack Co., 317 U.S. 239, 245-46, 63 S. Ct. 246, 87 L.Ed. 239 (1942)(emphasis added).

This principle that states may not expand or limit a party's rights or liabilities in contradiction to federal maritime law was best explained in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S. Ct. 2485, 91 L.Ed.2d 174 (1986):

> "Stated another way, the 'saving to suitors' clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards."

Id. at 222-23, citing Baxter, Choice of Law and the Federal System, 16 Stan.L.Rev. 1, 34 (1963)(referring to Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938))(emphasis added).

Offshore Logistics makes clear that, as in any Erie-type case, courts must determine whether the legal issue is substantive or procedural. If the issue is substantive, than the court is bound to apply the federal maritime law dealing with that issue.

In American Dredging Co. v. Miller, 510 U.S. 443, 114 S. Ct. 981, 127 L.Ed. 2d 285 (1994), this Court again addressed the question of whether the federal maritime law applied in lieu of state law. At issue in American Dredging was whether the maritime law of forum non conveniens preempted contrary state law on that issue. While it held that state law did apply, it did so because forum non conveniens was a procedural and not a substantive matter. American Dredging, 510 U.S. at 455, footnote 4. In addressing the scope of the state court's concurrent jurisdiction, this Court held:

> "In exercising in personam jurisdiction, however, a state court may 'adopt such remedies, and...attach to them such incidents, as it sees fit' **so long as it does not attempt to make changes in the 'substantive maritime law.'**

> Madruga v. Superior Court of California, 346 U.S. 556, 561 (1954) That proviso is violated when the state remedy '**works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.**' Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917)."

Id. at 446 (emphasis added). In further discussing the structure of federal maritime jurisdiction, this Court held:

> "One thing...is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character...."

American Dredging, 510 U.S. at 451, citing The

Lottawana, 88 U.S. 558, 575 (1875).

Both American Dredging and Offshore Logistics make clear that, while this U.S. Supreme Court permits state courts to supplement maritime law, it expressly prohibits doing so when a state court **"makes changes in the substantive maritime law," or interferes with the proper uniformity of that law.** American Dredging, 510 U.S. at 446 (emphasis added). This principle has continuously been enforced by this Court throughout the 20th Century. See e.g. Southern Pac. Co. v. Jensen, 244 U.S. 205, 37 Sup. Ct. 524, 61 L.Ed. 1086 (1917)(declaring state workers' compensation statutes invalid because their policies modified or displaced essential features of maritime law); Union Fish Co. v. Erickson, 248 U.S. 308, 39 Sup. Ct. 112, 63 L.Ed. 261 (1919)(state statute held invalid because it attempted to modify the remedial law of the admiralty courts)[5]; Kossick v. United Fruit Co., 365 U.S. 731, 742, 81 S.Ct. 886, 8 L.Ed.2d 56 (1961)(federal maritime rule validating oral contracts precluded application of state statute of frauds); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409, 74 S.Ct. 202, 98 L.Ed. 143 (1953)(maritime rule of comparative negligence barred application of state comparative negligence rule); Garrett v. Moore-

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[5] As cited by this Court in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124-25, 44 S.Ct. 274, 68 L.Ed. 582 (1924).

McCormack Co., 317 U.S. 239, 63 S. Ct. 246, 87 L.Ed. 239 (1942)(maritime rule allocating burden of proof displaced conflicting state rule).[6]

A concurring opinion from this U.S. Supreme Court has even indicated that maritime interest in uniformity applies directly to all maritime employment issues:

> "Unlike the land-based worker, the seaman's employment and all of the rights and restrictions flowing therefrom, are determined by federal statutory and admiralty law, not state law...
>
> ....
>
> ...The consistent and traditional control by federal law of every phase of maritime employment relationships and contracts refutes the proposition that [respondent's] contacts with Texas justify injecting state law into federal maritime affairs."

Oil Workers v. Mobil Oil Corp., 426 U.S. 407, 421-22, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976)(J. Powell,

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[6] As cited by this Court in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed. 578 (1996).

concurring), quoting Oil Workers v. Mobil Oil Corp., 504 F.2d 272, 284-286 (5th Cir. 1974)(J. Ainsworth, dissenting) (footnotes omitted).

Because the Iowa Supreme Court reached a decision in direct contradiction to three substantive maritime decisions from the Fourth and Fifth Circuit Courts of Appeals on the issue of wrongful termination, it has improperly interfered with the uniformity of maritime law. In addition, by recognizing a cause of action that was previously not available under maritime law, it has attempted to make changes to the existing substantive law. This has created conflicting maritime principles that must be addressed by this Court.

As a final matter, it should be noted that substantive maritime law consists not only of maritime statutes enacted by Congress but also maritime law as created by Federal Courts of Appeals:

> "[I]n the absence of some controlling statute, the general maritime law, **as accepted by the Federal courts**, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."

Southern Pacific Co. v. Jensen, 244 U.S. 205, 215, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)(emphasis added);

see Pope v. Talbot, Inc. v. Hawn, 346 U.S. 406, 410, 74 S.Ct. 202, 98 L.Ed.2d 736 (1953)(holding that "a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress **or interpretive decisions of this Court**.")(emphasis added); see also, J.B. Effenson Co. v. Three Bays Corp., 238 F.2d 611, 615 (5th Cir. 1956)(holding that substantive maritime law consists of "that which the Congress has enacted or the federal courts, sitting in admiralty or in the exercise of their maritime jurisdiction, have declared would apply."). Therefore, substantive maritime law is comprised as much by federal maritime court decisions, as it is comprised of federal maritime statutes enacted by Congress.

Based on the substantial authority cited above, it is clearly a fundamental principle of maritime law, as acknowledged by this U.S. Supreme Court's long history of maritime decisions, that uniformity among maritime courts must be preserved. Failure to do so is clear error.

B. Maritime courts and the U.S. Congress have already addressed the issue of wrongful termination when a maritime employee has been fired for refusing to violate a safety statute and held that such a cause of action exists only in very limited circumstances.

1. No cause of action exists for wrongful termination in maritime law under the facts of this case.

There is a body of federal maritime case law directly on point which holds that there is no cause of action for wrongful termination in violation of public policy when a maritime employee has allegedly been fired for refusing to violate a federal maritime safety statute.

First, in Feemster v. BJ-Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989), a tugboat captain brought a wrongful termination action against his former employer claiming that he was fired for refusing to violate 46 U.S.C. § 8104(h)(federal safety statute restricting tugboats operated by only one captain to twelve hours of operation in any twenty-four hour period). The captain asserted that, although he was an at-will

employee and could be discharged for any reason, a public policy exception existed that prevented him from being discharged for refusing to perform an unlawful act. Id. at 92.

In discussing the public policy exceptions to termination of at-will employees, the Fifth Circuit in Feemster held:

> [W]e believe it is significant that **Congress provided no private right of action for retaliatory discharge.** The general purpose of this legislation is to promote maritime safety, **but not with employees acting as private enforcers and as private attorneys general; the agent of enforcement is the Coast Guard.**
>
> * * *
>
> If [the captain] had filed such a complaint and had been fired for doing so, he certainly would have a stronger argument that his discharge contravened public policy.

Id. at 93-94 (emphasis added). The Court then held that no cause of action exists for wrongful termination when a maritime employee has been fired for refusing

to violate a safety statute.[7]

The holding in Feemster was reiterated and further expanded two years later by the Fourth Circuit Court of Appeals in Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826, 115 L.Ed.2d 996 (1991). In Meaige, a seaman was again fired for refusing to violate a federal maritime safety statute. In that case, the Fourth Circuit affirmed the rule that no private right of action exists under maritime law for wrongful discharge. Id. at 702 (adopting the analysis from Feemster). The court also upheld the general principle that a seaman is an at-will employee who may be discharged for any reason.

The most notable thing about the Fourth Circuit's decision in Meaige is that it expressly denied the maritime employee's attempt to bring a cause of action **under West Virginia state law of wrongful**

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[7] In holding that no cause of action existed, the Fifth Circuit expressly limited its prior holding in Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057 (5th Cir. 1981) which recognized a cause of action for wrongful termination when a seaman has been fired for filing a personal injury action. In relying on Smith, the Iowa Supreme Court failed to recognize that Fifth Circuit expressly refused to expand Smith in Feemster to cover these facts. (Appendix, page A8).

termination. Id. The Fourth Circuit Court stated that although state law might recognize a claim for wrongful termination, **admiralty courts do not look to state law when doing so would undermine the uniformity of federal law.** Id. at 702-03. The Fourth Circuit Court held that because there was "a body of federal maritime jurisprudence relating to wrongful discharge," reliance on the West Virginia state law would "undermine uniformity in federal admiralty law." Id. at 703. In doing so, the Fourth Circuit acknowledged the very important maritime law principle that:

> "Uniformity of application throughout the nation is a central purpose and feature of this exclusive jurisdiction [of maritime law]."

Id. at 702, citing The Lottawanna, 88 U.S. 558, 575, 22 L.E.d. 654, 1996 A.M.C. 2372 (1874).

A third and final case which adopted the principle that there is no cause of action for a maritime employee fired for refusing to violate a safety statute is Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990), cert. den., 499 U.S. 907, 111 S. Ct. 1108, 113 L.Ed.2d 218 (1991). In that case, the maritime employee attempted to bring a cause of action for wrongful termination under 46 U.S.C. § 2114, the "whistleblower" statute. This

statute states:

> "An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred."

46 U.S.C. § 2114(a).

In Garrie, the maritime employee alleged that he was discharged for calling the United States Coast Guard to inquire about compliance with a safety statute (also 46 U.S.C. § 8104(h)). Id. at 809. Because the employee did not actually notify the Coast Guard of the alleged violation, the seaman asked the court to expand 46 U.S.C. § 2114 to include causes of action for those employees who only make inquiries to the Coast Guard about safety standards, but do not file formal reports. Id.

In refusing to expand section 2114, the Fifth Circuit held that the statute narrowly applied to protect only those who had filed formal complaints. In addition, the Fifth Circuit reiterated its holding from

Feemster that there exists **"no general cause of action for wrongful discharge under maritime law."** Garrie, 912 F.2d at 813 (emphasis added). It held that the employee's remedy was to contact the Coast Guard to correct the violation, not to sue for wrongful discharge. Id.

These three federal maritime cases are directly on point as they are factually identical to this case. Here, the Clements are two river boat captains who assert that they were discharged because they refused to violate certain Coast Guard safety regulations. In Feemster, the statute that the seaman refused to violate was 46 U.S.C. § 8104(h), dealing with the number of permissible hours of operation. In this case, Byron and Mark Clements allege that they were discharged for refusing to violate:

(1) 46 U.S.C. § 8104(d) which states that a vessel may not be operated without having the required Certificate of Inspection.

(2) 46 CFR Subpart 15.515 which requires maintaining a certain number of crew members on the vessel at all times.

(3) 46 CFR Ch. 1, Subpart 110.25 and 91.45 which requires obtaining Coast Guard approval for any modification to

the riverboat. These statutes establish the requirements for making repairs and alterations to a vessel after obtaining Coast Guard approval.

(4) 46 U.S.C. § 3313 which requires a vessel to always be in compliance with the terms of its Certificate of Inspection.

These safety provisions dealing with manning requirements, modification requirements, and compliance with the Certificate of Inspection are procedures that insure the safe operation of the Miss Marquette Riverboat. As in Feemster, the proper course of action for someone who witnesses a violation of one of these statutes is to report the violation to the Coast Guard. The statutes were not created so that seamen could act as private attorney generals or enforcers of maritime law.

Based on these cases, it is undeniable that federal maritime courts have addressed the Clements' cause of action and held that it is not recognized under maritime law. As such, Meaige, Garrie, and Feemster represent substantive federal maritime law directly on point. The Fourth and Fifth Circuits have made clear that there is no cause of action for wrongful termination when a maritime employee is fired for refusing to violate a safety statute **even if there is state law (as in Meaige)**

which may provide such relief.

2. 42 U.S.C. § 2114 recognizes causes of action for wrongful termination only where a maritime employee has contacted, or is about to contact, the Coast Guard to report safety violations.

In reversing the district court, the Iowa Supreme Court failed to recognize that the Clements already had a potential cause of action under 46 U.S.C. § 2114, but they had failed to comply with the applicable federal maritime statute. In doing so, the Iowa Supreme Court essentially held that a maritime employee does not need to comply with the requirements of § 2114 if the employee's termination occurs in the State of Iowa.

According to 46 U.S.C. § 2114, maritime employees have a cause of action for wrongful termination when they are dismissed after they have reported, or are about to report, safety violations to the U.S. Coast Guard. If the employee fails to report the violation to the Coast Guard, they do not have a claim for wrongful termination. This condition precedent requiring the employee to contact the Coast Guard is based on sound public policy because it encourages maritime employees to come forward

and report safety violations as soon as they are discovered so that any potential hazards can be remedied by the Coast Guard immediately.

The recourse created in 46 U.S.C. § 2114 is not available in this case, however, because the Clements admitted, in undisputed terms, that they never contacted the Coast Guard to report any alleged violations. Knowing that they have not met the terms of the statute, their cause of action is simply an attempt **to create a new exception to section 2114.** Because the Clements never reported any of the alleged violations to the Coast Guard, they are barred from bringing their cause of action under 46 U.S.C. § 2114.

By reversing the district court, the Iowa Supreme Court has created a new exception to the maritime employee's at-will status. That exception states that maritime employees have no cause of action for wrongful termination if they are fired for refusing to violate a safety statute, unless they first contact the Coast Guard **or their termination occurs in the State of Iowa.** Surely maritime uniformity is essential enough to require that states such as Iowa follow maritime principles, in spite of state law to the contrary.

II. CONCLUSION

Based on the current federal maritime case law that occupies the field of wrongful termination in maritime cases, the Iowa Supreme Court has erred in failing to apply federal maritime case law.

First, the Iowa Supreme Court improperly interfered with the uniformity of federal maritime law when it refused to follow the Fourth Circuit Court of Appeals decision in Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826, 115 L.Ed.2d 996 (1991).

In Meaige, the Fourth Circuit Court of Appeals addressed whether state law of wrongful termination in violation of public policy is expressly preempted by the federal maritime law directly on point. The Fourth Circuit held that there was a federal body of maritime jurisprudence directly on point which expressly preempted any state law on the issue of wrongful termination. Id. at 702-703. In doing so, the Fourth Circuit cited this Court's decision in The Lottawanna for the proposition that uniformity of application throughout the nation is the central purpose of the exclusive jurisdiction of federal admiralty courts. Id. at 702.

The Iowa Supreme Court's decision in this case held that the Fourth Circuit incorrectly

interpreted existing federal maritime law. Is it sound judicial practice for a state court, landlocked in the middle of the United States, to be providing its own interpretation of the important principles of maritime law as governed by the federal courts? The Fourth and Fifth Circuit Courts of Appeal are better able to determine when maritime law has created a substantive principle which must be binding.

Clearly it is a disruption of substantive federal maritime law when states reach rulings contrary to, the decisions of the courts which were given special jurisdiction by the Constitution.

Second, the Iowa Supreme Court improperly interfered with the uniformity of substantive federal maritime law when it recognized a cause of action for wrongful termination that both the Fourth and Fifth Circuit Court of Appeals held did not exist. Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826, 115 L.Ed.2d 996 (1991); Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990) and Feemster v. BJ-Titan Services Co., 873 F.2d 91 (5th Cir. 1989).

In doing so, the Iowa Supreme Court failed to recognize that these decisions constitute substantive maritime law on the issue of wrongful termination of maritime employees which PREEMPT any state law. See e.g., Meaige.

In addition to failing to recognize the binding effect of the substantive maritime case law, the Iowa Supreme Court also failed to acknowledge Petitioners' argument that 46 U.S.C. § 2114 is the federal maritime statute on wrongful termination which requires that employees first contact the Coast Guard before being entitled to a claim for wrongful termination. Again, this statute constitutes substantive federal maritime law that was disregarded by the Iowa Supreme Court in recognizing the Clements' cause of action.

This Petition for Writ of Certiorari should be granted and the case either summarily reversed or set for plenary consideration.[8]

---

[8] Petitioners note that this Court recently granted certiorari in another maritime law case on May 30, 2000. Lewis, James F. v. Lewis & Clark Marine, Inc., Case No. 99-1331 (certiorari granted May 30, 2000). That case also deals with the relationship between maritime and state law. The issues in this case, however, raise an even more important federal question where a state court has attempted to overrule one Federal Court of Appeals decision (Meaige) and ignore two others (Feemster and Garrie).

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 48 / 98-1817

Filed April 26, 2000

BYRON P. CLEMENTS and **MARK W. CLEMENTS**,

Appellants,

Filed April 26, 200
Clerk Supreme Court

vs.

GAMBLERS SUPPLY MANAGEMENT COMPANY and **SODAK GAMING IOWA, INC.** a/k/a **SODAK GAMING, INC.**,

Appellees.

Appeal from the Iowa District Court for Clayton County, John Bauercamper, Judge.

Licensed ship captains who sued riverboat casino company for retaliatory discharge under state law theory appeal from adverse judgment challenging district court's conclusion that state law claims were preempted by federal maritime law. **REVERSED AND REMANDED.**

Timothy S. Jacobson of Parke O'Flaherty, Ltd., La Crosse, Wisconsin, and Deborah Hughes, Cedar Rapids, for appellants.

E. David Wright and Christopher R. Paar of Norman, Gilloon, Wright & Hamel, P.C., Dubuque, for appellees.

Considered en banc.

CARTER, Justice.

Byron P. Clements and Mark W. Clements, licensed ship captains employed by the management company for a riverboat casino in Marquette, Iowa, appeal from adverse judgment in an action seeking damages for wrongful discharge. The district court dismissed their claims, premised on state law, because it concluded that those state law claims were preempted by federal maritime law. After reviewing the record and considering the arguments presented, we disagree with the district court's conclusion. That judgment is reversed.

Byron and Mark Clements were employed by defendant Gamblers Supply Management Company (Gamblers Supply) commencing in 1994. Byron was the director of maritime operations, and Mark was the manager of marine operations. Both Byron and Mark

were licensed captains. Gamblers Supply operated a casino on the Miss Marquette Riverboat. At the time of the Clements' employment, the riverboat was required to leave the dock a certain number of times per year.

When the summary judgment motion papers are viewed most favorably towards the plaintiffs, it appears that Bvron and Mark discovered that their employer was violating various federal laws and regulations regarding inspection and repair of the riverboat. They confronted the management about these violations and indicated that they were concerned about the safety of the passengers and did not want to jeopardize their captains' licenses. In September 1995 Byron informed the riverboat management that he would not cooperate in structural modifications that would affect the boat's stability in the absence of express Coast Guard approval. The management expressed disapproval of his decision and terminated his employment on October 2, 1995. Mark's employment was terminated on June 28, 1996.

Byron and Mark filed petitions against Gamblers Supply and its parent company, defendant Sodak Gaming, alleging state law claims for wrongful termination. They contended they were terminated because they refused to violate federal safety regulations. The district court granted defendants'

motion for summary judgment on the basis that the plaintiffs were "seamen" and that federal maritime law preempted their state law claims. On appeal the Clements contend that the district court incorrectly decided the preemption issue and that Congress did not intend to preempt all state law claims by maritime employees.

In granting summary judgment, the district court relied on three decisions of federal courts. These were *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991); *Garrie v. James L. Gray, Inc.*, 912 F.2d 808 (5th Cir. 1990); and *Feemster v. BJ-Titan Services Co.*, 873 F.2d 91 (5th Cir. 1989). The Clements urge that two of the three cases relied on by the district court, *Garrie* and *Feemster* involve wrongful discharge claims under federal law. Those cases do not purport to foreclose related state law claims on a preemption theory. The Clements further argue that, although the *Meaige* decision does recognize the preemption of state law wrongful discharge claims based on a policy of uniformity in maritime litigation, this legal conclusion does not represent and is inconsistent with the current federal law of preemption.

We agree that the *Garrie* and *Feemster* cases pertain to issues involving a seaman's right to recover under federal law and do not speak to the preemption issue. *Meaige*, on the other hand, does speak to the

issue of preemption of state law claims. After upholding the dismissal of the plaintiff's wrongful discharge claim under federal maritime law, the court in *Meaige* addressed his companion state claim as follows:

> We also affirm the district court's judgment dismissing appellant's action for failure to state a claim under West Virginia common law . . . . Appellant and the district court failed to recognize the exclusive nature of federal admiralty law....
> . . . In this case, there is a body of federal maritime jurisprudence relating to wrongful discharge, and turning to West Virginia for the rule of decision would clearly undermine uniformity in federal admiralty law.

Meaige, 925 F.2d at 702-03.

The Clements urge that the *Meaige* court's reliance on the need for a uniform maritime law as the primary basis for its conclusions extends the need for uniformity too far. They rely on the views on uniformity expressed in *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993). In that case, the court, while considering whether a discharged seaman could premise a claim under a state

employment discrimination statute, rejected the employer's argument that application of state law would defeat uniformity in federal maritime litigation. The court dealt with that issue as follows:

> Once again, however, Exxon heralds the need for uniformity without an appreciation for the boundaries of its relevance. All state laws, if given effect in admiralty cases, will interfere to a degree with the uniformity of admiralty law. But when Congress established a separate admiralty jurisdiction and empowered the judiciary to develop substantive maritime principles for use nationwide, it simultaneously, assured that state law would continue to play some role in maritime affairs through the "saving to suitors" clause. This provision allows plaintiffs to pursue, in addition to maritime relief, ordinary civil remedies provided by state law, so long as they do not conflict with the national substantive maritime law.

Ellenwood, 984 F.2d at 1279 (citations and footnotes omitted).

The "saving to suitors" clause referred to in the *Ellenwood* opinion had its genesis in the Judicial Act of 1789 and is currently codified as follows in 28 U.S.C. § 1333(1):

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

In *American Dredging Co. v. Miller,* 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), the Supreme Court recognized that the consequence of exclusive federal jurisdiction in maritime matters is that states may not provide a remedy in rem for any cause of action within admiralty jurisdiction. *American Dredging Co.,* 510 U.S. at 446-47, 114 S.Ct. at 985, 127 L.Ed.2d at 293. In exercising in personam jurisdiction, however, the Court recognized that, under the "saving to suitors" clause, a state court may adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to make changes in the substantive maritime law. *Id.* at 447, 114 S.Ct. at 985, 127 L.Ed.2d at 293. In speaking of the need for uniformity, the Court indicated that the requirement of uniformity is not

absolute. The Court indicated that, while state law must yield to the needs of a uniform maritime law, this limitation still leaves the states a wide scope. *Id.* at 451-52, 114 S.Ct. at 987, 127 L.Ed.2d at 296. The *American Dredging Co.* decision expands the areas in which state laws may be imposed beyond the rigid dictum of this court in *Pfeiffer v. Weiland,* 226 N.W.2d 218, 220 (Iowa 1975).

The *Meaige* opinion on which the district court relied suggests that the "body of federal maritime jurisprudence relating to wrongful discharge" is an impenetrable body of law that fails to recognize a remedy for termination of employment as retaliation for an employee's assertion of concern for the safety of a ship and its passengers. We do not read the federal cases in this light. Federal courts have recognized a maritime common-law cause of action for wrongful discharge. *Smith v. Atlas Off-Shore Boat Serv., Inc.,* 653 F.2d 1057, 1063 (5th Cir. 1981); *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029, 1035 (E.D. Cal. 1995) (upholding state law claim for wrongful discharge based on refusal to place unseaworthy vessel in service) . In addition, Congress has recognized that a ship owner may not discharge a master or other supervisory employee for reporting violations of Coast Guard regulations. 46 U.S.C. § 2114(a).

The rule barring state claims that directly conflict with basic maritime principles may at times present a fine line in its application. *See American Dredging Co.*, 510 U.S. at 452-53, 114 S.Ct. at 987-88, 127 L.Ed.2d at 296-97 ("It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible...."). We conclude that no fundamental tenet of substantive maritime law is frustrated by the state law retaliatory discharge claims that the Clements are advancing in the present case.

The defendants have conceded for purposes of this appeal that Iowa law recognizes a cause of action for termination of an employee in a manner that offends against public policy. Brief for Appellees at 40. In *Smuck v. National Management Corp.*, 540 N.W.2d 669, 672 (Iowa App. 1995), the court of appeals held that termination based on a refusal to violate federal law would be contrary to public policy. Because the district court's ruling was based on a theory that federal law governed the rights of the parties to the exclusion of state law, the merits of the Clements' state law claims were not adjudicated in that court and are not now before this court. Because we conclude that the state law claim is not precluded by federal law, it must now be considered on its merits. The judgment of the district court is therefore reversed and the case remanded to that court for that purpose.

REVERSED AND REMANDED.

All justices concur except Lavorato, J., who takes no part.

IN THE IOWA DISTRICT COURT FOR CLAYTON COUNTY

BYRON P. CLEMENTS AND MARK CLEMENTS,	No. LACV5269
Plaintiffs,	COURT ORDER
VS.	
GAMBLERS SUPPLY AND MANAGEMENT COMPANY, and SODAK GAMING IOWA INC. also known as SODAK GAMING, INC.,	Filed 98 Sep 22 PM 2:51
Defendants.	

Hearing held with counsel September 22, 1998 on the Motion for Summary Judgment filed by defendants on July 31, 1998.

The Motion for Summary Judgment is **GRANTED** and the petitions at law filed by both plaintiffs are **DISMISSED** at their costs because:

1. There is no genuine dispute regarding the material facts on the issue of applicability of maritime law. The vessel is licensed and inspected by the coast guard, it is docked adjacent to the main channel of the Mississippi River, where it takes on passengers, and it cruises in the main channel of the river when it leaves port. Plaintiffs' own claims are based on alleged violations of federal maritime regulations. Both plaintiffs are "seamen", despite the fact that their job duties include some non-maritime tasks. See *Pfeiffer v. Welland*, 226 N.W.2d (Iowa 1975) and *McDermott Int'l Inc. V. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991).

2. Federal maritime law does not recognize a claim for wrongful termination of a seaman's employment who was discharge for refusing to violate safety regulations. See *Feemster v. BJ-Titan Services Co./Titan Services, Inc.*, 873 F.2d 91 (5th Cir. 1989); *Garrie v. James L. Gray, Inc.*, 912 F.2d 808 (5th Cir. 1990); and *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991).

DONE AND ORDERED:
September 22, 1998

/S/
John Bauercamper
Judge

IN THE SUPREME COURT OF IOWA

No. 48 / 98-1817

ORDER

BYRON P. CLEMENTS and **MARK W. CLEMENTS,**

Appellants,

vs.

Filed May 15, 2000
Clerk Supreme Court

GAMBLERS SUPPLY MANAGEMENT COMPANY and **SODAK GAMING IOWA, INC.** a/k/a **SODAK GAMING, INC.,**

Appellees.

After consideration by the court, en banc, appellee's Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 15th day of May, 2000.

THE SUPREME COURT OF IOWA

_____/s/_____
Arthur A. McGiverin, Chief Justice

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§ 3313. Compliance with certificate of inspection.

(a) During the term of a vessel's certificate of inspection, the vessel must be in compliance with its conditions, unless relieved by a suspension or an exemption granted under section 3306(e) of this title

(b) When a vessel is not in compliance with its certificate or fails to meet a standard prescribed by this part or a regulation prescribed under this part –

(1) the owner, charterer, managing operator, agent, master, or individual in charge shall be ordered in writing to correct the noted deficiencies promptly;

(2) the Secretary may permit any repairs to be made at a place most convenient to the owner, charterer, or managing operator when the Secretary decides the repairs can be made with safety to those on board and the vessel;

(3) the vessel may be required to cease operating at once; and

(4) if necessary, the certificate shall be suspended or revoked.

(c) The vessel's certificate of inspection shall be revoked if a condition unsafe to life that is ordered to be corrected under this section is not corrected at once.

(d) The owner, charterer, managing operator, agent, master or individual in charge of a vessel whose certificate has been suspended or revoked shall be given written notice immediately of the suspension or revocation. The owner or master may appeal to the Secretary the suspension or revocation within 30 days of receiving the notice, as provided by regulations prescribed by the Secretary.

§ 8101. Complement of Inspected vessels.

(a) The certificate of inspection issued to a vessel under part B of this subtitle shall state the complement of licensed individuals and crew (including lifeboatmen) considered by the Secretary to be necessary for safe operation. A manning requirement imposed on –

(1) a sailing school vessel shall consider the participation of sailing school instructors and sailing school students in the operation of that vessel;

(2) a mobile offshore drilling unit shall consider the specialized nature of the unit; and

(3) a tank vessel shall consider the navigation, cargo handling, and maintenance functions of that vessel for protection of life, property, and the environment.

(b) The Secretary may modify the complement, by endorsement on the certificate, for reasons of changed conditions or employment.

(c) A requirement made under this section by an authorized official may be appealed to the Secretary under prescribed regulations.

(d) A vessel to which this section applies may not be operated without having in its service the complement required in the certificate of inspection.

(e) When a vessel is deprived of the service of a member of its complement without the consent, fault, or collusion of the owner, charterer, managing operator, agent, master, or individual in charge of the vessel, the master shall engage, if obtainable, a number of members equal to the number of those of whose services the master has been deprived. The replacements must be the same or higher grade or rating than those whose places they fill. If the master finds the vessel is sufficiently manned for the voyage, and replacements are not available to fill all the vacancies, the vessel may proceed on its voyage. Within 12 hours after the vessel arrives at the

destination, the master shall report in writing to the Secretary the cause of each deficiency in the complement. A master failing to make the report is liable to the United States Government for a civil penalty of $1,000 for each deficiency.

(f) The owner, charterer, or managing operator of a vessel not manned as required by this section is liable to the Government for a civil penalty of $10,000.

(g) A person may not employ an individual as, and an individual may not serve as, a master, mate, engineer, radio officer, or pilot of a vessel to which this part applies or which is subject to inspection under chapter 33 of this title if the individual is not licensed by the Secretary. A person (including an individual) violating his subsection is liable to the Government for a civil penalty of not more than $10,000. Each day of a continuing violation is a separate offense.

(h) The owner, charterer, or managing operator of a freight vessel of less than 100 gross tons, a small passenger vessel, or a sailing school vessel not manned as required by this section is liable to the Government for a civil penalty of $1,000. The vessel also is liable in rem for the penalty.

(i) When the 2 next most senior licensed officers on a vessel reasonably believe that the master or individual in charge of the vessel is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel, the next most senior master, mate, or operator licensed under section 710(c)(1) or (3) of this title shall –

(1) temporarily relieve the master or individual in charge;

(2) temporarily take command of the vessel;

(3) in the case of a vessel required to have a log under chapter 113 of this title, immediately enter the details of the incident in the log; and

(4) report those details to the Secretary –

(A) by the most expeditious means available; and

(B) in written form transmitted within 12 hours after the vessel arrives at its next port.

Subpart 91.45 – Repairs and Alterations

§ 91.45-1 Notice required.

(a) No repairs or alterations affecting the safety of the vessel with regard to the hull, machinery, or equipment, shall be made without the knowledge of the Officer in Charge, Marine Inspection.

(b) Drawings of alterations shall be approved before work is started unless deemed unnecessary by the Officer in Charge, Marine Inspection.

(c) Drawings will not be required for repairs in kind.

§ 91.45-5 Inspection required.

(a) An inspection either general or partial depending upon the circumstances shall be made whenever any important repairs or alterations are undertaken.

§15.515 Compliance with certificate of inspection.

(a) Except as provided by §15.725, no vessel may be operated unless it has in its service

and on board the complement required by the certificate of inspection.

(b) Any vessel subject to inspection under 46 U.S.C. 3301 must, while on a voyage, be under the direction and control of an individual who holds an appropriate license issued by the Coast Guard. For the purposes of this paragraph:

(1) A voyage is the period of time necessary to transit from the port of departure to the final port of arrival.

(2) A port does not include an Outer Continental Shelf (OCS) facility as defined in 33 CFR part 140.

Subpart 110.25 – Plan Submittal

§110.25-1 Plans and information required for new construction.

The following plans, if applicable to the particular vessel, must be submitted for Coast Guard review in accordance with §110.25-3:

NOTE: A Navigation and Vessel Inspection Circular on the Subject of "Coast Guard Review of Merchant Vessel Plans and Specifications" is available from the offices listed in §110.25-3. The

Circular recommends practices and procedures for plan submittals.

(a) Elementary one-line wiring diagram of the power system, supported, by cable lists, panelboard summaries, and other information including –

(1) Type and size of generators and prime movers;

(2) Type and size of generator cables, bus-tie cables, feeders, and branch circuit cables;

(3) Power, lighting, and interior communication panelboards with number of circuits and rating of energy consuming devices;

(4) Type and capacity of storage batteries;

(5) Rating of circuit breakers and switches, interrupting capacity of circuit breakers, and rating or setting of overcurrent devices;

(6) Computations of short circuit currents in accordance with Subpart 111.52; and

(7) Overcurrent protective device coordination analysis for each generator distribution system of 1500 kilowatts or above that includes selectivity and shows that each overcurrent device has an interrupting capacity sufficient to interrupt the maximum asymmetrical short-circuit current available at the point of application.

(b) Electrical plant load analysis including connected loads and computed operating loads for each condition of operation.

(c) Elementary and isometric or deck wiring plans, including symbol lists, and manufacturer's name and identification of each item of electric equipment, of each:

(1) Steering gear circuit and steering motor controller;

(2) General alarm system;

(3) Sound powered telephone system;

(4) Power operated boat winch;

(5) Fire detecting and alarm system;

(6) Smoke detecting system;

(7) Electric watertight door system;
(8) Fire screen door holding system;
(9) Emergency loudspeaker system;
(10) Manual alarm system; and
(11) Supervised patrol system.

Each isometric or deck wiring plan must show the location of any cable splice.

(d) Deck wiring or schematic plans of power systems and lighting systems, including systems and lighting systems, including symbol lists, with manufacturer's name and identification of each item of electric equipment, and showing:

(1) Locations of cables;
(2) Cable sizes and types;
(3) Locations of cable splices.

(e) Switchboard writing diagram.

(f) Switchboard material and nameplate list.

(g) Elementary wiring diagram of metering and automatic switchgear.

(h) Description of operation of propulsion control and bus transfer switchgear.

(i) For vessels with hazardous locations as defined in Subpart 111.105 of this chapter, plans showing the extent and classification of all hazardous locations. Information including manufacturer's name, model identification, and equipment location must be submitted for all electrical equipment in these hazardous locations.

(j) Plans and installation instructions for each intrinsically safe system approved by Underwriters Laboratories Inc., Factory Mutual Research Corporation, or other independent laboratory recognized by the Commandant (see §111.105-11).

(k) Motor starter elementary wiring diagram, enclosure drawing, and starter application.

(l) Plans and information sufficient to evaluate equipment required by this subchapter to be approved or accepted by the Commandant.

NOTE: This equipment includes soundpowered telephones, navigation lights, submerged cargo pump motors, and equipment to be considered for equivalency under §110.20-1 of this part.

(m) Plans and information sufficient to evaluate equipment or systems required to meet the

specifications of this Subchapter but not to be approved by the Commandant.

NOTE: This equipment evaluation is generally done by District Merchant Marine Technical Offices and includes cable splices, signaling lights, shore connection boxes, electric oil immersion heaters, submersible motor-driven bilge pumps, engine order telegraph systems, shaft speed and thrust indicator systems, rudder angle indicators, and steering failure alarm systems.

(n) Plans and information sufficient to evaluate equipment required by this subchapter to meet a reference standard or military specification.

NOTE: This equipment evaluation is generally done by District Merchant Marine Technical Offices and includes circuit breakers, switches, lighting fixtures, electric cooking equipment, motor operated appliances, dishwashers, refrigerators, water coolers, air heating equipment, busways, and outlets and junction boxes. Items that are required to meet a UL standard will be considered acceptable based on indication of listing or labeling on a material list or plan. Items required by this subchapter to meet an IEEE, NEMA, or ANSI standard, or a military specification will be considered acceptable if manufacturer's certificate of compliance is indicated on a material list or plan.

FILED
AUG - 3 2000
CLERK

(2)

No. 00-0034

In The

Supreme Court of the United States

GAMBLERS SUPPLY MANAGEMENT CO.
AND SODAK GAMING IOWA INC.,
A/K/A SODAK GAMING, INC.,

Petitioners,

v.

BYRON CLEMENTS AND MARK CLEMENTS,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Iowa

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STATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates certain facts that are critical to this Court's analysis of the Question Presented.

First, Petitioners fail to adequately describe the nature of their business, which affects whether maritime law is even implicated in this case. The primary business of Petitioners, collectively referred to herein as "Gamblers Supply," during the term of Byron and Mark Clements' employment was to operate a casino. Due to restrictions in Iowa law, Gamblers Supply had to operate its casino in the form of a riverboat named the Miss Marquette with the requirement that the boat leave dock a certain number of times per year in order to maintain its gambling license.

Pursuant to the direction of the non-marine management of Gamblers Supply, the Miss Marquette did not leave dock any more than the minimum required trips per year. While the Miss Marquette did travel a few miles up and down the Mississippi River, it only docked in one place: Marquette, Iowa. The Miss Marquette did not board passengers at a port in any other state, nor did the Miss Marquette haul cargo or conduct other commerce from one state to another. Furthermore, the office of Byron Clements, as Director of Marine Operations, was not physically located on the Miss Marquette vessel.

The duties of Byron Clements, while including such tasks as being responsible "for the safe operation of a casino vessel to be docked in Marquette, Iowa, on the Mississippi River," also included responsibility for such non-maritime tasks as maintenance and cleaning of the

pavilion on land, staffing and scheduling of maintenance personnel, procurement and inventory management of maintenance supplies, and being the insurance claims coordinator. The duties of Mark Clements as Manager of Marine Operations included responsibility for such non-maritime tasks as staffing and scheduling maintenance and cleaning of the pavilion on land, staffing and scheduling of maintenance personnel, procurement and inventory management of maintenance supplies, and being responsible to the Director for the insurance claims program and budget.

Second, Petitioners mischaracterize the holding of the Iowa Supreme Court in this case, stating that it "held that even though maritime law applied, Iowa courts . . . could ignore existing federal maritime law on the issue." (Petition p. 7.) The Iowa Supreme Court did not ignore existing federal cases. Rather, it thoroughly analyzed the relevant decisions, recognized a split of authority in the federal courts, and followed the most recent federal court of appeals decision on point, *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993), *reh'g denied* (Feb. 23, 1993), *cert. denied*, 508 U.S. 981 (1993), a case which is consistent with a line of U.S. Supreme Court decisions holding that courts in admiralty cases can reach beyond maritime precedents and apply state laws to protect the welfare of seamen, absent a conflict with a fundamental tenet of admiralty law.

Third, Petitioners mischaracterize the applicability of two "of three decisions from Federal Courts of Appeals directly on point. . . . " (Petition p. 8.) Two of the three primary decisions relied on by Petitioners did not involve the assertion of *any* state law claims and did not discuss preemption in any way, shape or form. *See Feemster v. BJ-*

Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989) (declining to extend the holding of *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), to the facts of that case in which the plaintiff asserted a claim of wrongful termination under federal maritime law); *Garrie v. James L. Gray, Inc.*, 912 F.2d 808, 810 (5th Cir. 1990), *cert. denied*, 499 U.S. 907 (1991) (holding that the plaintiff had failed to prove up the 46 U.S.C. §2114 claim he had filed). Both the *Feemster* and *Garrie* decisions acknowledged the continued vitality of seaman wrongful discharge claims in the context of a personal injury. 873 F.2d at 94; 912 F.2d at 810 n.7.

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether the Iowa Supreme Court improperly interfered with the "uniformity" of federal maritime law when it followed the holding of *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993), *reh'g denied* (Feb. 23, 1993), *cert. denied*, 508 U.S. 981 (1993), and other federal decisions by remanding Byron and Mark Clements' retaliatory discharge claim to the trial court for consideration on the merits, rather than affirming dismissal pursuant to *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991), *cert. denied*, 501 U.S. 1217 (1991).

Petitioners seek to foist on the Court the fiction that maritime law imposes a uniform rule prohibiting seamen[1]

[1] While the Iowa Supreme Court did not explicitly reach the issue of whether Byron and Mark Clements were "seamen" in its decision, Respondents have never conceded that they were

from asserting wrongful termination claims except in narrow circumstances. Contrary to Petitioners' assertions, the trend of decisions in federal courts, and in state courts under the "saving to suitors" clause of the Judiciary Act of 1789, makes clear that retaliatory discharge claims by maritime employees have vitality in a wide variety of situations, including the specific facts of this case. Also, a long line of Supreme Court decisions establishes that the need for a uniform maritime law leaves states a wide scope to provide state law remedies to seamen. Petitioners fail to cite, let alone attempt to explain, the most recent court of appeals decision on point, *Ellenwood*, which is directly contrary to their argument.

In a transparent attempt to grab the Court's attention, Petitioners argue that the Iowa Supreme Court

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seamen at the time of, and in relation to, termination of their administrative positions at Gamblers Supply Management Co. The Supreme Court in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S. Ct. 807, 818, 112 L. Ed. 2d 866 (1991), held that the question of who is a "member of a crew," and therefore who is a "seaman," is best characterized as a mixed question of law and fact. Various courts and commentators have noted the muddy waters with respect to the application of maritime law to riverboat casinos. *Moreno v. Grand Victoria Casino*, 2000 WL 521728 (N.D. Ill. 2000); *King v. President Riverboat Casino-Mississippi, Inc.*, 894 F. Supp. 1008 (S.D. Miss. 1995) (declining to find jurisdiction over riverboat patron's personal injury suit); Murky Liability Status sets Waterfront Gambling Adrift, 11/24/94 Nat'l L.J. at B1; *see also, Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982) (requiring sufficient nexus with traditional maritime activity). Nevertheless, even if we assume *arguendo* that Byron and Mark Clements were seamen, their claim of retaliatory discharge survives preemption.

"fail[ed] to recognize the binding nature of substantive maritime law. . . . " (Petition p. 8.) In reality, the Iowa Supreme Court's decision is consistent with the most current and widely adopted rulings of the federal courts. Thus, the Petition for Writ of Certiorari should be denied.

I. THE CRITERIA FOR REVIEW HAVE NOT BEEN MET BECAUSE THE IOWA SUPREME COURT APPLIED WELL-SETTLED PRINCIPLES OF LAW AS SET FORTH BY THE U.S. SUPREME COURT IN *ASKEW V. AMERICAN WATERWAYS, AMERICAN DREDGING CO. V. MILLER* AND *YAMAHA V. CALHOUN* AND THE FIRST CIRCUIT COURT OF APPEALS IN *ELLENWOOD V. EXXON.*

A. The Iowa Supreme Court followed the most recent federal court decisions on the issue of whether maritime law preempts state claims for wrongful termination under the public policy exception to the employment-at-will doctrine.

Respondents respectfully address this Court on the single issue in this case: The preemptive effect of maritime law on wrongful discharge actions based on state law. Petitioners attempt to characterize the Iowa Supreme Court's decision as violating an alleged uniform rule of maritime law prohibiting claims by seaman for wrongful termination. Contrary to Petitioners' assertions, there is no uniform rule on this issue, and the majority of federal and state court decisions are unfavorable to Petitioners.

Byron and Mark Clements' state court petition at law (complaint) contained a single claim for relief (one count for each plaintiff) against Gamblers Supply alleging that

Gamblers Supply was liable under Iowa law for terminating the employment of Byron and Mark in retaliation for their refusal to violate federal safety laws. The district court granted Gamblers Supply's motion for summary judgment, ruling that maritime law preempted Clements' state law causes of action. The Iowa Supreme Court reversed and remanded for further proceedings to address the merits of Clements' state law claim.

The Iowa Supreme Court followed a line of federal decisions, including the most recent cases to address the issue of the preemptive effects of maritime law on state law claims for wrongful termination, *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993), *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), and *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029, 1035 (E.D. Cal. 1995), in which it was held that such claims are not preempted. *See also, Higgins v. Smith Int'l Inc.*, 716 F.2d 278 (5th Cir. 1983), *disavowed on other grounds by Overman v. Fluor Constructors, Inc.*, 797 F.2d 217, 219 (1986).

In ruling against preemption, the First Circuit Court of Appeals in *Ellenwood* noted that the U.S. Supreme Court recently reiterated the longstanding principle that the historic police powers of the states are not to be superceded by federal act unless that course is "the clear and manifest purpose of Congress." *Ellenwood*, 984 F.2d at 1274 (citing, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. at 2716 (1992)). "Thus, the presumption is against preemption." *Ellenwood*, 984 F.2d at 1274.

In its analysis, the *Ellenwood* court also noted that "Supreme Court cases make it clear that courts in admiralty cases may reach beyond maritime precedents and apply

state laws 'absent a clear conflict with the federal [maritime] law'. " *Id.* at 1278 (quoting, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973)); *see also, American Dredging Co. v. Miller*, 510 U.S. 443, 447, 114 S. Ct. 981, 985, 127 L. Ed. 2d 285, 293 (1994). In addition, the court concluded that state human rights statutes may be applied in maritime cases.

> Indeed, it would be anomalous for maritime law, which has always shown "a special solicitude for the welfare of seamen and their families," *Miles*, 489 U.S. at 36, 111 S. Ct. at 327, to reject such an employee-sensitive provision. *See also, Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1063 (5th Cir. Unit A 1981) (noting "the admiralty courts' protective attitude towards the seamen"). " '[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy.' " [Citations omitted] (state law "is generally referred to only when it affords greater protection to maritime employees than that afforded by admiralty law").

Ellenwood, 984 F.2d at 1280-81.

State law is referred to by the courts when it "affords greater protection to maritime employees than that afforded by admiralty law." *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 6 n.1 (1st Cir. 1983), *citing, Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-11 (1953).

Moreover, under its exercise of maritime jurisdiction pursuant to the "saving to suitors" clause, the Iowa Supreme Court was correct in following *Ellenwood* and deferring to local policy. *See Fireman's Fund American Ins. Co. v. Boston Harbor Marina, Inc.*, 406 F.2d 917, 919, 921

(1st Cir. 1969); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970); *Alcoa S.S. Co. v. Charles Ferra & Co.*, 383 F.2d 46, 50 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968) (court may adopt state law by reference or by virtue of the less developed nature of federal law); *Giglio v. Farrell Lines, Inc.*, 424 F. Supp. 927 (D.N.Y. 1977) (where clear precedent in the law of the sea are lacking, maritime law may look to the law prevailing on the land). Employment issues have not been fully developed in the maritime common law.[2] On the other hand, this cause of action is well developed on land.[3] The evolving status of the maritime common law of wrongful discharge is not, however, a valid reason to deny the existence of a cause of action. Furthermore, such a holding is inconsistent with the overriding maritime policy of protecting the seaman. *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782-83 (1952); *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d at 1063.

State substantive law has long played an important role in maritime matters, and "there are numerous instances in which the general maritime law has been

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[2] *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("To claim that all enforced rights pertaining to matters maritime are ruled in Federal Law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in the regulation of maritime commerce."); *cf., Kelley v. Schlumberger Technology Corp.*, 2 IER Cases 126 (D. Mass. 1987), *affirmed*, 849 F.2d 41 (1st Cir. 1988).

[3] Virtually all but a handful of jurisdictions recognize a cause of action for wrongful discharge in violation of public policy. *Labor Relations Reporter: Individual Employment Rights Manual* (BNA) 505:51-52 (February 1992).

modified or supplemented by state action." 2 AM. JUR. 2D *Admiralty* §137 (1994).

The first Congress, in the Judiciary Act of 1789, set forth that the jurisdiction of the federal courts over claims in maritime and admiralty law to be exclusive, but saved to suitors in all cases "the right of a common-law remedy, where the common-law is competent to give it." 1 Stat. 76 §9 (currently located at 28 U.S.C. §1333). The language of the "saving to suitors" clause of the Judiciary Act of 1789 remained unchanged until 1948. 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, JURISDICTION 3D §3672 n.2 (1998). At that time, the words "common law remedy" were removed, but the Supreme Court subsequently ruled that the new language would be interpreted the same as the old. *Madruga v. Superior Court of Calif.*, 346 U.S. 556, 74 S. Ct. 298 (1954); *see also* Revisor's Note to 28 U.S.C. §1333 (new language represented a stylistic preference).[4]

"With the saving clause, the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit." 2 AM. JUR. 2D *Admiralty* §121 (1994), *citing, Moore v. Purse Seine Net*, 18 Cal. 2d 835, *aff'd*, 318 U.S. 133, *reh'g denied*, 318 U.S. 801.

> It is in the very nature of the saving clause that if it is otherwise applicable, a proceeding in a state court cannot be objected to on the ground that the cause of action is maritime in character.

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[4] The saving to suitors clause was amended again in 1949, but the amendment merely changed the phrase "libellant and petitioner" to the word "suitor" as was used in the original Judiciary Act. Act of May 24, 1949, c. 139, §79, 63 Stat. 101.

> Because of that clause, a federal admiralty court and a state court may have concurrent jurisdiction.
>
> §122. Proceedings in personam as within savings clause
>
> State remedies in personam are generally within the scope of the "saving to suitors" clause. An example of a claim within the "savings to suitors" clause is an action in personam to recover damages for a tort, which is the most familiar type of exercise of the jurisdiction of state courts under the saving clause.

2 AM. JUR. 2D *Admiralty* §§121-22 (1994).

Congress provided no federal remedy for marine employees who are terminated for refusing to violate the law in the absence of a report of the law violation to the Coast Guard prior to the termination. Nor did Congress expressly preempt state law remedies for those persons.

A good example of the role state substantive law has played in maritime matters is the application of state laws for wrongful death and survival actions in maritime accident cases.[5] A recent U.S. Supreme Court case, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), provides an apt illustration. In that case, Yamaha moved for a partial summary judgment against the plaintiff, arguing that the federal maritime law for a wrongful death action the Supreme Court recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375

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[5] The *Ellenwood* court also examined the history of maritime wrongful death actions to illustrate the leading role state law sometimes plays in maritime cases. 984 F.2d at 1280.

(1970), provided the exclusive basis for a recovery, displacing all remedies afforded by state law. The Supreme Court rejected Yamaha's argument, holding "that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action. . . . " *Id.*, 133 L. Ed. 2d at 583.

Because the case involved a watercraft collision on navigable waters, it fell within admiralty's domain. " 'With admiralty jurisdiction,' we have often said 'comes the application of substantive admiralty law.' " *Id.* at 585 (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986)). "The exercise of admiralty jurisdiction, however, 'does not result in automatic displacement of state law.' " *Yamaha*, 133 L. Ed. 2d at 585 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995)). "Indeed, prior to *Moragne*, federal admiralty courts routinely applied state wrongful death and survival statutes in maritime acts and cases." *Yamaha*, 133 L. Ed. 2d at 586. The *Yamaha* court noted that *Moragne* "centered on the extension of relief, not on the contraction of remedies" and "notably left in place the negligence claim [Moragne] had stated under Florida's law." *Id.*, 133 L. Ed. 2d at 590-91.

The Supreme Court further stated that the need for a uniform federal maritime law "still leaves the States a wide scope." *Id.* at 588 n.8; *see also, American Dredging Co.*, 510 U.S. at 451-52, 114 S. Ct. at 987, 127 L. Ed. 2d at 296. The Court refused to precisely delineate that scope, stating that "it would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence." *Yamaha*, 133 L. Ed. 2d at 588 n.8.

In the context of wrongful death actions involving maritime employees, the courts have applied the various state wrongful death and survival laws since at least 1907, *see e.g., The Hamilton*, 207 U.S. at 398, to supplement maritime law. In the more recently developed area of claims of wrongful termination, cases such as *Ellenwood v. Exxon Shipping Co.* and *Higgins v. Smith Int'l, Inc.* have allowed former employees in maritime businesses to pursue claims under state law.

Petitioners in the present case rely on *Feemster v. BJ-Titan Services Co./Titan Services, Inc.*, 873 F.2d 91 (5th Cir. 1989), *Garrie v. James L. Gray, Inc.*, 912 F.2d 808 (5th Cir. 1990), and *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991), in an attempt to demonstrate that the Iowa Supreme Court's decision ignored substantive maritime law.[6] Petitioners' reliance is misplaced. *Feemster* and *Garrie* are inapposite to the facts of the present case. The claims of Messrs. Feemster and Garrie, unlike the claims of Byron and Mark Clements, had been based solely on *federal* maritime law. Clements recognized that they might not be able to state a claim under federal law, and their petition at law set forth only a state law claim.

The *Ellenwood* case, which is more recent than the *Feemster* and *Garrie* cases, recognizes a wrongful termination claim under *state* law.[7] The *Ellenwood* decision is

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[6] It is important to note that none of these cases cited by Gamblers Supply involve a passenger vessel such as the Miss Marquette in which the public safety concerns are as great and the state's police powers are as strongly implicated.

[7] "[W]e reverse the district court's ruling . . . that plaintiff's claim of violation of state public policy is similarly preempted,

consistent with the practice of courts in admiralty allowing the expansion and supplementation of maritime law with state law claims where maritime law does not itself provide a remedy. *See* 2 AM. JUR. 2D *Admiralty* §121 (1994).

Petitioners implicitly resort to the doctrine of "field preemption," under which "preemption may be inferred because 'the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Petitioners seek to avoid undertaking an inquiry into the pervasiveness of federal maritime regulation under the Judiciary Act. Instead, they rely on *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991), which held that federal maritime law did occupy the field of employment rights to the exclusion of state law remedies.

Meaige held, in a summary fashion, that it was important "to recognize the exclusive nature of federal admiralty law" and that "[u]niformity of application throughout the nation is a central purpose and feature of this exclusive jurisdiction." *Id.* at 702. The *Meaige* opinion is flawed by what it did *not* say. First, there was no attempt to identify any indication that Congress intended to preempt state causes of action. Second, in expanding the scope of the preempted field, the court gave no effect to, and ignored, the presumption against preemption. Third, the court gave no explanation or authority for its proposition that imposing liability for damages in a tort

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and the case is therefore remanded for further proceedings on such claims. . . . " *Ellenwood*, 984 F.2d at 1287.

lawsuit is equivalent to state legislative or administrative regulation for purposes of preemption. Fourth, the court failed to explain the need for uniform remedies for plaintiffs in different parts of the country. *See Ellenwood*, 984 F.2d at 1279: "Once again, however, Exxon heralds the need for uniformity without an appreciation for the boundaries of its relevance."

> As we observed in *Carey*, "the Supreme Court . . . no longer construes the Admiralty Clause as requiring 'rigid national uniformity in maritime legislation.' " 864 F.2d at 207 (citation omitted). *See also Lyon v. Ranger III*, 858 F.2d at 27; G. Gilmore & C. Black, *The Law of Admiralty*, at 49-50 (2d ed. 1975). In other words, a state law claim should not be dismissed simply because it would result in differing remedies for plaintiffs in different parts of the country; such a claim is foreclosed only if the state law in question frustrates a fundamental tenet of admiralty law.

Ellenwood, 984 F.2d at 1279. Yet another defect in *Meaige* was its almost comical reference to "a body of federal maritime jurisprudence relating to wrongful discharge. . . . " *Meaige*, 925 F.2d at 703. The "body" of jurisprudence the *Meaige* court referred to was a single case that declined to create a federal cause of action for wrongful discharge, *Feemster v. BJ-Titan Services Co./Titan Services*, 873 F.2d 91 (5th Cir. 1989), and one other case that *did* create a federal cause of action for wrongful discharge, albeit in the personal injury context. *Smith v. Atlas Off-Shore Boat Serv.*, 653 F.2d 1057 (5th Cir. 1981). It is important to realize that the sole case that the *Meaige* court relied on to support its holding as part of this

"body" of case law, *Feemster*, did not involve the assertion of *any* state law claims and did not discuss preemption in any way, shape or form.[8]

During the years following the *Meaige* decision, the U.S. Supreme Court has addressed the question of preemption of state tort causes of action. *See, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996). These decisions clearly demonstrate that *Meaige* was incorrectly decided. *Meaige* was on the wrong track, and Petitioners follow it to their peril.

In the present case, the Iowa Supreme Court correctly followed federal precedent in remanding Clements' claim to the trial court for a decision on the merits. Accordingly, the Petition must be denied.

B. Federal and state court decisions have permitted seamen to assert wrongful termination claims in a variety of situations, and the Iowa Supreme Court followed the trend in the law protecting seamen from wrongful termination.

1. Respondents have a valid retaliatory discharge claim under the facts of this case.

Courts, both state and federal, have held that claims under state law relating to wrongful discharge are not preempted by federal maritime law in a variety of situations.

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[8] *Feemster* involved a request "to create a private right of action under general maritime law. . . . " *Feemster*, 873 F.2d at 92.

In the leading case of *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), the Fifth Circuit recognized a maritime common law cause of action for wrongful discharge. Since the case was one of first impression, the Court turned to the non-maritime common law of wrongful discharge for guidance. *Smith*, 653 F.2d at 1060. The Court found it:

> particularly appropriate in light of the admiralty court's protective attitude towards the seaman. The judiciary's leading role in fashioning controlling rules of maritime law and in reshaping old doctrine to meet changing conditions makes the admiralty court peculiarly sensitive to the inequities inherent in the traditional rule. Moreover, this type of cause of action is not without federal precedent.

Smith v. Atlas Off-Shore, 653 F.2d at 1063.

Similarly, in *Higgins v. Smith Int'l Inc.*, 716 F.2d 278 (5th Cir. 1983), the court applied state law to the claim by a former offshore oil rig employee for breach of an employment contract in the context of a personal injury claim under the Jones Act and in admiralty.

The trend started by *Smith v. Atlas Off-Shore* and *Higgins v. Smith Int'l* to allow seamen to assert state law claims for wrongful termination was continued by *Ellenwood v. Exxon Shipping Co.*, 948 F.2d 1270, 1278 (1st Cir. 1993), which found "no 'clear and manifest' intent on the part of Congress to preempt state handicap discrimination claims . . . " and held that "[o]ur preemption analysis applies as well to Ellenwood's claim for wrongful discharge based on public policy." Not only did the court of appeals not find a "clear and manifest" intent on the part

of Congress to preempt such claims, but also, it did not even find "signals of such an intent." *Id.*

Another example is *Borden v. Amoco Coastwise Trading Company*, 985 F. Supp 692 (D.C. Tex. 1997), in which the captain of an ocean tug was terminated because he refused to sail in the face of two storms on two different occasions. The captain sued the employer for wrongful discharge, claiming that if he would have sailed the tug, he would have violated 46 U.S.C. §10908, which prohibits sending an unseaworthy vessel to sea that will endanger lives. The district court held that although admiralty law governed the wrongful discharge claim, Texas employment law may also be applicable to the extent it was not inconsistent with admiralty principles, and under maritime law, an exception to the employment-at-will doctrine exists when the employee's termination violates clearly important public policy.

The state court case of *Baiton v. Carnival Cruise Lines, Inc.*, 661 So.2d 313 (Fla. Ct. App. 1995), provides useful analysis of federal maritime cases dealing with wrongful termination. In *Baiton*, an employee sued Carnival, his maritime employer, for retaliatory discharge under federal maritime law and under Florida's whistle-blower statute, alleging that the discharge was motivated in substantial part by the employee's refusal to give a false statement in a personal injury action against the maritime employer. The court held that the employee had a cause of action for retaliatory discharge, and federal maritime law relating to retaliatory discharge did not preempt the state whistle-blower statute.

Carnival argued that the case facts fell under *Feemster v. BJ-Titan Services Co./Titan Services*, 873 F.2d 91 (5th Cir. 1989), and *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991) (which disallowed wrongful termination claims), and not under *Smith v. Atlas Off-Shore Boat Serv.*, 653 F.2d 1057 (5th Cir. 1981) (which allowed a seaman to assert a retaliatory discharge claim), because Baiton's claim was factually distinguishable from *Smith* on the basis that *Smith* is confined to allowing a wrongful termination claim for a plaintiff who is discharged for filing a personal injury action.

The court held that Baiton's cause of action was not precluded by *Feemster* and *Meaige*, stating that the facts fell under the *Smith* case, because allowing retaliatory discharge would constitute an abuse of the employer's right to terminate the employment relationship when the employer utilizes that right to contravene an established public policy. *Baiton*, 661 So.2d at 315.

In the present case, Byron and Mark Clements filed a petition (complaint) against Gamblers Supply and its parent company Sodak Gaming alleging that their employment was terminated because they refused to violate federal safety regulations, including violations that may have affected the very stability and seaworthiness of the Miss Marquette Riverboat and the safety of its passengers. (A. 3.) For purposes of this appeal, Petitioners have conceded that Iowa law recognizes a cause of action for termination of an employee in a manner that offends against public policy, and that the refusal of an employee to violate federal law would be contrary to public policy. (A. 9.)

The facts of the present case fit squarely into the majority rule of the federal courts allowing seamen to assert wrongful termination claims when their termination violates a clear public policy. No rule of maritime law is contradicted by the Iowa Supreme Court's decision in the case at bar, and thus, the Petition must be denied.

2. 46 U.S.C. §2114 provides an *additional* remedy for seamen under certain circumstances, and it does not limit the right of Respondents to seek relief under other theories of liability.

Petitioners assert that 46 U.S.C. §2114 (protection of seamen against discrimination)[9] creates additional requirements and a "condition precedent" for seamen to assert claims of retaliatory discharge, specifically that the seaman must report, or be about to report, a violation of law to the Coast Guard. (Petition p. 25.) Petitioners further claim that the Iowa Supreme Court created an exception to the requirements of 46 U.S.C. §2114 by allowing a state law claim of retaliatory discharge without Byron and Mark Clements first contacting the Coast Guard. (Petition p. 26.) Petitioners' argument misses the boat.

Respondents concede that to pursue a claim under 46 U.S.C. §2114 it is necessary that a seaman must have contacted or be about to contact the Coast Guard to report the violation of law. However, §2114 is irrelevant to this case, because Respondents have never asserted a

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[9] Petitioners incorrectly reference the statute as being located in Title 42 instead of Title 46 of the United States Code. (Petition p. 25.)

claim under that statute. In addition, the statute exists to provide seamen an *additional* remedy, not to eliminate other remedies under state or federal common law. *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029, 1034-35 (E.D. Cal. 1995) (In circumstances in which §2114 provides no remedy, general maritime law provides a wrongful termination cause of action, because discharge of a captain for refusing to pilot a vessel that he reasonably believes is unseaworthy violates public policy). No part of §2114 expresses an intent on the part of Congress to preempt state law claims, and no state or federal cases cited by Petitioners have suggested that the trend started in *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), to provide a remedy for retaliatory discharge was altered by the later passage of §2114 in 1984.

Several cases have allowed seamen to pursue retaliatory discharge claims under the common law and/or state statutory law, even though the seamen could not necessarily satisfy the elements of §2114. *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993); *Borden v. Amoco Coastwise Trading Company*, 985 F. Supp 692 (D.C. Tex. 1997); *Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp 1029 (E.D. Cal. 1995); *Baiton v. Carnival Cruise Lines, Inc.*, 661 So.2d 313 (Fla. Ct. App. 1995). Likewise, Respondents in the present case must be allowed to pursue a claim of wrongful termination under the public policy exception to the employment-at-will doctrine as the Iowa Supreme Court correctly decided, and the Petition must be denied.

CONCLUSION

The "saving to suitors" clause of the Judiciary Act of 1789, a long line of U.S. Supreme Court cases recognizing that "courts in admiralty cases may reach beyond maritime precedents and apply state laws 'absent a clear conflict with the federal [maritime] law,' " and several decisions of state and federal courts provide a firm basis for former maritime employees to assert *in personam* claims for wrongful termination under state law even in circumstances in which federal maritime law does not itself provide a remedy. Such state law claims are not preempted by maritime law regardless of whether or not the employment was related to traditional maritime commerce. In addition, there is a disputed issue as to whether Clements' employment with Gamblers Supply was sufficiently related to traditional maritime commerce to even implicate maritime law.

Petitioners fail to advance any significant or substantial reason for review. The Iowa Supreme Court properly applied well-settled principles regarding state law remedies for maritime employees. Review by the Supreme Court will not fulfill any of the requirements or

goals of Rule 10(b), and the petition for review should be denied.

Respectfully submitted,

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No. 00-0034

IN THE

Supreme Court of the United States

GAMBLERS SUPPLY MANAGEMENT CO. AND SODAK GAMING IOWA INC., A/K/A SODAK GAMING, INC.,

Petitioners

v.

BYRON P. CLEMENTS AND MARK W. CLEMENTS,

Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of Iowa

REPLY BRIEF

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CORPORATE DISCLOSURE (RULE 29.6)

Sodak Gaming, Inc. is a wholly owned subsidiary of International Game Technology, which is a publicly traded company on the New York Stock Exchange.

Gamblers Supply Management Company has been merged into Isle of Capri Marquette, Inc., which is a wholly owned subsidiary of Isle of Capri Casinos, Inc. Isle of Capri Casinos, Inc. is a publicly traded company on the NASDAQ.

There are no other publicly traded corporations which own more than a ten percent share in either Sodak Gaming, Inc. or Gamblers Supply Management Company.

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STATEMENT OF THE CASE - REPLY

In their Opposition Brief to the Petition for Writ of Certiorari, Respondents make much of the fact that Petitioners operate a casino vessel, that the vessel left the dock only a minimum number of times per year, and that Respondents had some "non-maritime" job duties. (Opposition Brief, p. 1) These assertions, however, go to the issue of whether this should be considered a maritime cause of action, an issue that has not been appealed to this Court.

Pursuant to United States Supreme Court Rule 12.5, Respondents were afforded the opportunity to file a Cross Petition for Writ of Certiorari on the issue of whether this is a maritime cause of action. Respondents, however, failed to file such a Cross Petition. As a result, the Iowa Supreme Court's holding that maritime law applies to casino vessels operating on the inland waters of the Mississippi stands as the law of the case.

The real issue before this Court is whether the Iowa Supreme Court improperly interfered with the uniformity of substantive federal maritime law when it failed to apply three federal courts of appeals decisions directly on point to the issue of a wrongful termination action by a maritime employee allegedly fired for refusing to violate a safety statute.

Based on the arguments set out in the Petition for Writ of Certiorari, and based on the responsive arguments set out below, Respondents ask this Court to grant its Petition for Writ of Certiorari.

ARGUMENT

I. RELIANCE ON ELLENWOOD V. EXXON SHIPPING CO., 984 F.2d 1270 (1st Cir. 1993) IS COMPLETELY MISPLACED BECAUSE IT DID NOT ADDRESS THE ISSUES IN THIS CASE AND ELLENWOOD DID NOT OVERRULE THE HOLDINGS OF FEEMSTER, GARRIE, OR MEAIGE.

Petitioners come before this Court continuing to rely on the Fourth and Fifth Circuit Courts of Appeals decisions in Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826 (1991); Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990), cert. den., 499 U.S. 907, 111 S. Ct. 1108 (1991); Feemster v. BJ-Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989). These cases are directly on point and hold that no cause of action exists for wrongful termination when a maritime employee is fired for refusing to violate a safety statute.

In their Brief in Opposition, Respondents rely heavily, as the Iowa Supreme Court did, on Ellenwood v. Exxon Shipping Co., 984 F.2d 1270 (1st Cir. 1993).

Respondents assert that Ellenwood is the most recent court of appeals decision on point and that Ellenwood is directly contrary to Petitioners' position. (Brief in Opposition, p. 4) For several reasons, that assertion is untrue.

First, it must be noted that Ellenwood does not even address the issue of whether a maritime employee has a cause of action for wrongful termination when the employee is fired for refusing to violate a safety statute. Ellenwood is a **handicap discrimination** case which fails to even mention Feemster, Garrie, or Meaige anywhere in the opinion. In other words, Ellenwood fails to address the very issue that is before this Court. This is not apparent in Respondents' Brief, however, as Respondents failed to include a factual analysis of Ellenwood for this Court's review. Respondents chose instead to simply extract quotations as needed to bolster their argument without presenting the facts that show that Ellenwood has no application in this case.

Second, in Ellenwood the First Circuit was faced with the issue of whether a state law claim could be used in a maritime case where **maritime law had not previously addressed handicap discrimination**. Id. at 1278. The First Circuit held that where maritime law has not addressed a particular issue, state law may supplement maritime law. However, **where maritime law is clearly stated on an issue, as is the case here**, state law cannot contradict maritime law.

Prior to appeal, the federal district court in Ellenwood held that because maritime law had not expressly addressed the issue of handicap discrimination, no such cause of action could be brought under maritime law. The federal district court stated in its ruling: "I am not aware of any basis under maritime law for such recovery" and subsequently held that none existed, dismissing the employee's cause of action. Id.

On appeal, the First Circuit overruled the district court's decision, holding that the lower court had overestimated the preempted power of maritime law. Id. In doing so, however, the court stated:

> **"[W]e have been shown nothing in substantive maritime law that is even potentially at odds with state human rights statutes such as those underlying Count IV of Ellenwood's complaint (wrongful discharge in violation of public policy)."**

Id. at 1280 (emphasis added). The First Circuit held that state law can be used to supplement maritime law where **maritime courts have never addressed the issue**.

Factually, this is not the case here. In the present case there are three federal courts of appeals decisions directly on point which have addressed the issue and held that maritime law does not recognize a cause of action for wrongful termination under the facts of this

case. As a result, there is clearly substantive maritime law holding against Respondents' position.

Third, Ellenwood does not, as Respondents assert, overrule Feemster, Garrie, or Meaige. In fact, the First Circuit in Ellenwood even acknowledged that under certain circumstances, state law will be deemed preempted by federal law:

> "[I]n areas where Congress has not entirely displaced state regulation, **state law will be deemed preempted to the extent it actually conflicts with federal law**."

Id. at 1274, quoting California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987) (emphasis added)(quotations omitted).

The decisions rendered by the Fourth and Fifth Circuits in Feemster, Garrie, and Meaige constitute a binding body of federal maritime law directly on point which is neither contradicted nor called into question by Ellenwood. This body of law should have been relied upon by the Iowa Supreme Court to affirm the grant of summary judgment. Failure to do so has created a conflict with the existing federal maritime law which must be addressed by this Court. See e.g., California Federal Savings, 479 U.S. at 281.

II. EVEN IF ELLENWOOD IS VIEWED AS BEING CONTRARY TO FEEMSTER, GARRIE, AND MEAIGE, A CONFLICT EXISTS BETWEEN THE CIRCUITS THAT MUST BE RESOLVED BY THIS COURT.

Even if this Court were persuaded that the First Circuit in Ellenwood reached a decision that is contrary to the holdings from the Fourth and Fifth Circuits in Feemster, Garrie, and Meaige, then there is even more reason for this Court to grant the Petition for Writ. United States Supreme Court Rule 10(a) indicates that certiorari can be granted when a federal court of appeals has rendered a decision that is in conflict with the decision of another federal court of appeals. If Respondents' position is taken as true, Rule 10 applies in that a conflict exists between the circuits that must be addressed by this Court.

The same can be said for the other case law cited by Respondents which they assert is contrary to Feemster, Garrie, and Meaige. While none of the authority cited by Respondents overrules the three most important cases at issue here, Feemster, Garrie, and Meaige, Respondents argue that the case law indicates that they were wrongly decided. At the very most, the cases relied on by Respondents, including cases from the First Circuit Court of Appeals, do nothing more than demonstrate that a conflict may exist in the circuits as to the preemptive effect of substantive federal maritime law.

While none of the federal decisions cited by Respondents are on appeal to this Court, if this Court believes the case law cited by Respondents is truly contrary to Petitioners' position, a conflict does exist between the Fourth, Fifth and First Circuit Courts of Appeals which should be laid to rest by the granting of this Petition for Writ.

III. THE REMAINING CASE LAW RELIED ON BY RESPONDENTS DOES NOT JUSTIFY THE IOWA SUPREME COURT'S IMPROPER INTERFERENCE WITH SUBSTANTIVE FEDERAL MARITIME LAW.

In their Brief in Opposition, Respondents have also placed a great deal of weight on this Court's holding in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed. 578 (1996). Respondents assert that this decision "clearly demonstrates that Meaige was incorrectly decided." (Brief in Opposition, p. 15) This case, which permitted use of a state law for relief in a wrongful death action, again does not overrule, or even contradict, Feemster, Garrie, or Meaige.

In Yamaha, this Court addressed the very narrow issue of the application of civil state tort remedies to a **nonmaritime civilian** who was killed in a tragic jetski accident. In doing so, this Court **expressly limited** its holding to cases which involve **wrongful death actions of non-seaman**:

> "We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was Moragne's design to terminate state remedies when **non-seafarers** meet death in territorial waters."

Id. at 210, n. 8 (emphasis added). In addition the court noted:

> "Traditionally, state remedies have been applied in accident cases of this order - maritime wrongful death cases in which no federal statute specifies the appropriate relief **and the decedent was not a seaman, longshore worker, or person otherwise engaged in maritime trade."**

Id. at 200 (emphasis added).

This Court in Yamaha acted to preserve a civilian's claim for wrongful death. In doing so, it expressly limited its holding to wrongful death cases brought by non-seamen. It is distinguishable not only because of its limited holding, but because the Fourth and Fifth Circuits have already specified the appropriate relief and indicated why no cause of actions exists for seamen who raise claims for wrongful termination.

Nothing in this Court's holding in Yamaha indicates a belief that state law can be given effect in a maritime case when it directly contradicts federal

maritime law. In Yamaha, this Court simply opened up state law in cases of wrongful death where **there is no federal statute and the decedent is not a maritime employee**. This is not the same case here and the holdings of Feemster, Garrie, and Meaige should be recognized and preserved.

Respondents also err in their reliance on other case law from other circuits. Both Respondents and the Iowa Supreme Court relied on Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. 1981) and Seymore v. Lake Tahoe Cruises, Inc., 888 F. Supp. 1029 (E.D. Cal. 1995) to support the position that federal maritime law would recognize Respondents' cause of action. In addition, Respondents further rely on Higgins v. Smith Int'l Inc., 716 F.2d 278 (5th Cir. 1983).

First, it is important to note that Smith and Higgins were both decided by the same Fifth Circuit Court of Appeals that decided Feemster and Garrie. More importantly, Feemster and Garrie were decided several years after Smith and Higgins and the Fifth Circuit still refused to recognize Respondents' cause of action. In fact, in Feemster, **the Fifth Circuit expressly limited Smith to cases where a seaman is fired for bringing a personal injury suit against his employer.** Id. at 93. In other words, Feemster, a case decided nine years after Smith by the same Fifth Circuit Court of Appeals, **refused to expand Smith** to include cases where a seaman is fired for refusing to violate a safety statute.

Second, the Seymore case from Eastern District

of California federal circuit court involved a maritime employee fired for refusing to violate a statute, where violation of the statute would have subjected him to felony criminal sanctions under 46 U.S.C. § 10908. That district court was cognizant of the need to preserve Feemster, and distinguished itself by relying on the fact that Seymore involved criminal statutes. In addition, the Seymore case was never appealed and, as such, it is not binding on the federal courts of appeal.

Respondents rely heavily on case law that neither contradicts nor even addresses the issues raised by the Fourth and Fifth Circuits in Feemster, Garrie, and Meaige. This is the same mistake that was made by the Iowa Supreme Court in ignoring the binding precedent of federal maritime case law. Petitioners now ask this Court to grant its Petition for Writ so that they may be heard on this issue.

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